SUPREME COURT, U.S.
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No. 3741

# In the Supreme Court of the United States

OCTOBER TERM, 1970

MILLER-DAVIS COMPANY, a Corporation,

*Petitioner,*

vs.

PREMIER ELECTRICAL CONSTRUCTION COMPANY, a Corporation,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OWEN RALL
PETER M. SFIKAS
135 S. LaSalle Street
Chicago, Illinois 60603
*Counsel for Petitioner*

July 10, 1970

McCORMICK & HENDERSON INC., CHICAGO

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Petitioner Miller-Davis Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on March 6, 1970.

## OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit not yet reported, appears in the appendix hereto.

The opinion of the United States District Court is reported at 292 F.Supp. 213, and also appears in the appendix.

## JURISDICTION

The judgment of the Court of Appeals was entered March 6, 1970. A timely petition for rehearing *en banc* was denied on April 15, 1970, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

## QUESTION PRESENTED

Whether respondent, after judgment was entered in favor of petitioner in an earlier suit brought by respondent against petitioner alleging breach of contract, may relitigate its claim against petitioner by simply alleging a violation of Section 1 of the Sherman Act, when both suits arise out of the same transaction and have a "common nucleus of operative facts."

## STATEMENT OF THE CASE

On or about March 11, 1968, the petitioner was served with the complaint in this case seeking damages for an alleged violation of the Sherman Act. Earlier in October, 1966, respondent had filed suit against petitioner alleging a breach of contract. Both suits were brought in the United States District Court for the Northern District of Illinois. The first suit filed went to trial on March 13, 1968, and was concluded March 27, 1968. The complaint filed in October, 1966 sought damages in the amount of Sixty-Five Thousand Dollars ($65,000.00) for breach of contract and by an amended two count complaint filed during the trial, also alleging breach of contract, this sum was reduced to Forty Thousand Dollars ($40,000.00) to conform to respondent's proof.

Both the original complaint and the amended complaint seeking damages for breach of contract and the complaint in the instant case arise out of the same occurrence, namely, the bidding for a certain construction project of the Atomic Energy Commission (hereinafter AEC) in Argonne, Illinois. The allegations in these three complaints, except as to the theory of recovery, are virtually identical.

Thus, in Paragraph 3 of the complaint in the instant case, respondent alleges that petitioner is "engaged in the general contracting business" (A. 5)[1], and in the amended complaint in paragraph 3 the same allegation is made (A. 42). In paragraph 5 of the instant complaint, respondent alleges that the AEC "operated a certain facility financed by public funds, known as Argonne National Laboratory in Argonne, Illinois," (A. 5) and in the amended complaint in paragraph 4 the same allegation is made (A. 42).

Likewise, in paragraph 6 of the instant complaint and paragraph 5 of the amended complaint, respondent alleges that the AEC sent invitations to various general contractors, including petitioner, to submit bids for a project known as Accelerator Improvement ZGS, FY-65 at Argonne National Laboratory (A. 5, 42). In paragraph 7 of the instant complaint and paragraph 6 of the amended complaint, it is alleged that a significant portion of the aforesaid project was composed of electrical work to be performed by an electrical contractor to be selected by the successful general contractor (A. 6, 42-43).

Paragraph 8 of the instant case and paragraph 7 of the amended complaint allege that some time subsequent to

[1] The Appendix which was filed in the Seventh Circuit Court of Appeals and re-filed in this Court is cited herein as "A." with the page number.

February 3, 1966 the petitioner sent out invitations to various electrical contractors, including respondent, to submit a bid for the electrical work (A. 6, 43).

The instant complaint went on to allege that petitioner and St. Arnaud Electric Co. "conspired to restrict the competition" of petitioner by inducing St. Arnaud's competitors, including respondent, to submit higher bids to petitioner's competitors (A. 6). Respondent also alleged that respondent submitted an oral bid to petitioner and that at that time petitioner advised respondent that if respondent would "protect" petitioner by submitting higher electrical bids to petitioner's competitors, petitioner would award the electrical contract to respondent if it was awarded the prime contract by the AEC (A. 7). Respondent alleged that it advised petitioner that it would "protect" petitioner provided petitioner would inform the respondent if it received a lower bid than respondent's bid in order that respondent could then make its bid available to petitioner's competitors, and that petitioner so agreed (A. 7-8).

The instant complaint further alleged that petitioner failed to advise respondent that it had received any bid that was competitive to respondent's bid, that petitioner was awarded the prime contract, and that it, in turn, awarded the sub-contract to St. Arnaud (A. 8). Respondent then prayed for relief because it was "damaged" by virtue of the foregoing in that it "was deprived of its fair and reasonable profit on the said electrical subcontract in the amount of $65,000" (A. 9).

In Count I of the amended complaint in the earlier action, respondent alleged that it gave petitioner an oral bid on March 3, 1966, and that petitioner then advised respondent that if respondent would "protect" the peti-

tioner by submitting higher bids to petitioner's competitors, petitioner would accept respondent's bid and award respondent the subcontract providing petitioner did not receive a lower bid. (A. 43-44). This Count also alleged that respondent made a "counter-offer" wherein respondent offered to "protect" petitioner's position providing petitioner advised respondent if it did receive a bid lower than respondent's at which time respondent would be released from its obligation to "protect" petitioner and that at no time thereafter did petitioner inform respondent that it received a lower electrical bid (A. 43-44). This earlier complaint also alleged that respondent did give higher bids to petitioner's competitors but that the electrical contract was awarded to St. Armand (A. 44). Respondent prayed for relief for the reason that it "was damaged in that it lost its fair and reasonable profit".

Count II of the amended complaint in the earlier action has the same prefatory allegations as Count I does; however, respondent then alleged that petitioner did not receive a lower bid than that submitted by respondent, and that this constituted the breach of contract (A. 45).

Because the complaint in the case at bar was simply another attempt to obtain relief for the alleged breach of contract, and because of the prior pending suit, petitioner filed a verified motion to dismiss (A. 18). This motion was filed on April 22, 1968, approximately one month after the trial had been concluded in the earlier action. The motion prayed for dismissal on the grounds of failure of the complaint to state a claim upon which relief could be granted, *res judicata* and the doctrine of *in pari delicto*. The trial judge after receiving extensive legal memoranda from the parties allowed this motion to dismiss and wrote an opinion (292 F.Supp. 213). Judgment was entered in favor of petitioner on September 20, 1968 (A. 36-37) on the grounds of *in pari delicto* and *res judicata*.

The trial judge in the earlier action, sitting without a jury, had taken the case under advisement and, after receiving findings of fact and conclusions of law and legal memoranda from the parties, entered judgment on the merits on September 23, 1968, (A. 68) and specifically found that there was no contract between the petitioner and respondent. His opinion is reported at 291 F.Supp. 295 (1968), and his judgment was affirmed by the Seventh Circuit Court of Appeals.

The Seventh Circuit Court of Appeals in reviewing the judgment based upon *in pari delicto* and *res judicata* reversed, holding that certain factual inquiries should be made by the trial judge in order to discern the applicability of *in pari delicto*. In addition, the court held that as to *res judicata* "since final judgment had not been rendered in the contract action when the decision was announced in the antitrust action, *res judicata* was inappropriate." The court further observed that petitioner maintains that this defect is now cured since final judgment has been entered on the contract action and stated, "[a]ssuming, without deciding that we should therefore affirm the district court on this basis, we, nevertheless, think that *res judicata* would be inapplicable to bar respondent's antitrust claim" for the reason that "[t]he antitrust claim rests primarily upon a conspiracy between petitioner and St. Arnaud to deceive respondent occurring prior to any dealings between" respondent and petitioner. The court then follows with a footnote which states that the district court's decision rests in part on the ground of comity and that "*[i]n light of our holding that the antitrust and contract actions constitute separate causes of actions*, we believe that comity would, at most, have justified a stay of the antitrust action pending the outcome of the contract action" ((Italics ours). The footnote makes it clear that

the court considers its decision as a holding on the question of what constitutes a cause of action, and, thus, this aspect of the case is ripe for review in this Court. This is particularly true in the case at bar for the reason that, if there was a defect with respect to the applicability of *res judicata* because of the lack of a final judgment, this situation existed for only three days. At the time this decision was being reviewed by the Seventh Circuit, there was a final judgment which was itself before the Court by an appeal of the suit first filed.

Because of the importance of the doctrine of *res judicata* to the administration of justice in the federal courts, petitioner seeks certiorari to this Court.

## REASONS FOR GRANTING THE WRIT

### I.

### IT IS EXTREMELY IMPORTANT WITH RESPECT TO THE ADMINISTRATION OF JUSTICE IN THE FEDERAL COURTS FOR THE SUPREME COURT TO DEFINE THE APPLICATION OF RES JUDICATA IN LIGHT OF MODERN, LIBERAL PLEADING REQUIREMENTS.

Perhaps the single most important current challenge of the seventies to the judiciary is to provide relief to litigants promptly. The old adage that justice delayed is justice denied was never truer. Staggering backlogs and long delays in the termination of controversies will not restore confidence in our judiciary. There can be no doubt that the heavy burden of litigation now facing both state and federal courts is one of the most pressing problems of our society. See generally, Vestal: Rationale of Preclusion, 9 St. Louis U. L. Rev. 29, 32 (1964).

Although the efficient use of the doctrine of *res judicata* is surely not the complete answer to the perplexing problems facing our judiciary, it is one of the important means by which our courts can without any injustice speed up the disposition of litigation which has no utility to society. Our society can no longer afford the luxury of a second lawsuit based upon the same or related facts as was the subject matter of an earlier lawsuit. Despite the fact that all unsuccessful litigants would like a second chance for victory, society demands that the already congested court dockets be cleared. As Lord Coke stated in the celebrated *Ferrer's Case*: "The end of all humani laws" is "rest and quietness," *Ferrer's Case*, VI Coke 7 (1599).

The decision of the Seventh Circuit Court of Appeals in the instant case does not serve the societal need of providing speedy relief for litigants. On the contrary, this decision looks back to the days of narrow pleading requirements and the archaic concept of "cause of action". Rules 15, 18 and 19 of the Federal Rules of Civil Procedure permit a plaintiff in one action to sue for all grounds of relief, and with slight limitations, none of which are relevant in the instant case, to join all parties that are necessary in order to enable the plaintiff to properly prosecute its claim or claims. Commentaries to Rule 18, 28 U.S.C.A. 45.

As this Court recently observed in *United Mine Workers v. Gibbs*, 383 U.S. 715, 724 (1966):

> "Under the [Federal] Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged."

There can be no doubt whatsoever that the respondent in the case at bar could have included its purported anti-trust claim in the first suit filed against petitioner, and that it could also have joined St. Arnaud, the co-defendant in the second suit, as a defendant in the first suit. Thus, respondent could have very easily sued for all the relief that it desired in its first lawsuit. Where there are liberal rules relating to pleading requirements such as there are in the Federal Courts, the whole trend of the law is directly contrary to the Seventh Circuit's decision in the case at bar. See Note, Developments In the Law—Res Judicata, 65 Harv. L. Rev. 818, 826 (1952).

As Professor James Wm. Moore has succinctly stated (1B Moore's Federal Practice ¶0.410 at 1160 [2d ed. 1965]):

> ". . . a second suit is needless in any forum whose procedural rules permit the presentation in one action

of all grounds for relief, whether legal or equitable, and whether the remedies sought are consistent or inconsistent. Sound authority supports this position."

Judge Goodrich placed this modern application of *res judicata* in proper perspective in *Williamson* v. *Columbia Gas & Electric Corp.*, 186 F.2d 464 (3d Cir. 1950), *cert. denied*, 341 U.S. 921 (1951) wherein he stated (pp. 469-470):

> "A reading of the early cases as compared with recent ones makes it clear that the meaning of 'cause of action' for res judicata purposes is much broader today than it was earlier. Formerly the whole aim in pleading, and in the elaborate system of writs, was to frame one single legal issue. That being the guiding principle, the phrase 'cause of action' came to have a very narrow meaning. If the theory in the second suit was unavailable under the writ used in the first suit, the plaintiff had no opportunity to litigate it there and so plaintiff was not barred by res judicata. The force of the rule is still operative but the scope of its operation has been greatly limited by the modernization of our procedure. The principle which pervades the modern systems of pleadings, especially the federal system, as exemplified by the free permissive joinder of claims, liberal amendment provisions, and compulsory counterclaims, is that the whole controversy between the parties may and often must be brought before the same court in the same action."

Thus, the Court of Appeals for the Third Circuit concluded that, because of the broadened scope of the doctrine of *res judicata*, it did not have to reach the question whether the allegation of conspiracy in the first suit filed, decided after the decision in a later suit, precluded the application of the doctrine, because *res judicata* was held applicable irrespective of what the cause of action was in the first suit—this for the simple reason that plaintiff should have included in the first suit decided all of his claims for recovery.

The decision of the Seventh Circuit in the case at bar demonstrates that a rigid application of the identity-of-causes-of-action test to determine whether *res judicata* applies clearly defeats the purpose of *res judicata*, namely, the elimination of needless litigation. Mr. Justice Frankfurter in *Angle* v. *Bullington*, 330 U.S. 183, 193 (1947), defined "needless litigation" in the following manner:

> "The doctrine of res judicata reflects the refusal of law to tolerate needless litigation. Litigation is needless if, by fair process, a controversy has once gone through the courts to conclusion. [citing authority] And it has gone through if issues *that were or could have been dealt with in an earlier litigation are raised anew between the same parties.*" (Italics ours).

The broadened concept of cause of action finds expression in this Court in the area of pendent jurisdiction in *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966), and in the area of collateral estoppel in criminal cases in the special concurring opinion of Mr. Justice Brennan in *Ashe* v. *Swenson*, ..... U.S. ....., 25 L.Ed.2d 469, 478 (1970).[2] The test of "common nucleus of operative facts" employed in the foregoing cases is one which this Court should carry over as the test of the applicability of *res judicata* to cut through the inherent confusion of the cause-of-action test.

Since the adoption by this Court of the significant changes, discussed above, in the Federal Rules of Civil Procedure, this Court has not addressed itself to the doctrine of *res judicata*. The decision in this case by the Seventh Circuit will stand as a bar to any attempt to broaden the concept of cause of action for *res judicata*

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[2] For a good discussion of the many sound reasons in favor of a test other than "cause of action", see Note, *UMW* v. *Gibbs and Pendent Jurisdiction*, 81 Harv. L. Rev. 657 (1968).

purposes. For these reasons, this Court should grant certiorari to review the scope of *res judicata* under the liberal pleading provisions of the Federal Rules of Civil Procedure and to establish guidelines for its use in the administration of justice in the federal courts.

## II.

## THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF RES JUDICATA.

In essence, the decision of the Seventh Circuit is that *res judicata* is not available to petitioner (Miller-Davis) because: "[t]he antitrust claim rests primarily upon a conspiracy between Miller-Davis and St. Arnaud to deceive Premier occurring prior to any dealings between Premier and Miller-Davis."

Thus, the court deems the allegation of conspiracy determinative, despite the fact that decisions such as *Koblitz v. Baltimore R. R. Co.*, 164 F.Supp. 367 (S.D.N.Y. 1958) and *Williamson v. Columbia Gas & Electric Corp.*, 186 F. 2d 464 (3d Cir. 1950), *cert. denied*, 341 U.S. 921 (1951) also dealt with the allegation of a conspiracy and rejected the reasoning employed by the Seventh Circuit.[3] The fact of the conspiracy is completely immaterial in the instant case. The foundation of respondent's claim in both lawsuits is its failure to obtain the electrical sub-contract irrespective of the alleged means used to thwart respondent, be they an alleged breach of contract or an alleged

[3] In *Williamson* the allegation was that the conspiracy was a continuing one, and, as noted, the court, nevertheless, had no difficulty in applying *res judicata*. *A fortiorari*, *res judicata* should have been applied in the instant case because the alleged conspiracy had ended.

conspiracy. The fact that respondent's claim is essentially the same in both lawsuits is further supported by the nature of the damages sought by respondent in the second lawsuit, to wit: "Plaintiff was deprived of its fair and reasonable profit on the said electrical subcontract . . ." (A. 9) which allegation is almost identical to the damages claimed in the first suit. Plainly, respondent in both lawsuits was suing for the loss of the sub-contract. The respondent should not be permitted to bring two suits to correct what obviously is one alleged wrong. *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316 (1927).

This decision of the Seventh Circuit is in conflict with numerous decisions of the other circuits. In *Norman Tobacco & Candy Co. v. Gillette Safety Razor Co.*, 295 F. 2d 362 (5th Cir. 1961), the plaintiff also first brought suit for breach of contract and then followed with a second suit alleging a violation of the antitrust laws. The Fifth Circuit affirmed the trial court's allowance of defendant's motion for summary judgment, and observed at 363-364:

> "It is settled, contrary to appellant's contention, that a litigant may not split his claim and have two trials on the same alleged breach of duty. Basically, Norman claimed that same 'right' in both suits—the right to purchase Gillette products direct from Gillette. The only wrong charged against Gillette was its refusal to continue to deal with Norman. We held in the contract case that Norman had not shown that Gillette wrongfully refused to deal with it. There, appellant relied upon the breach of Gillette's supposed contractual relationship as the basis of its claim. Here, appellant relies upon the breach of the antitrust laws as the basis for the alleged breach. But there was one breach and one only and appellant has had its day in court and has lost. 'It cannot litigate this same breach again.' Ballard v. First National Bank of Birmingham, 5 Cir., 1958, 259 F.2d 681;

Mendez & Company v. General Motors Corporation, 7 Cir., 1947, 161 F.2d 695, and Williamson v. Columbia Gas & Electric Company, 3 Cir., 1950, 186 F.2d 464, certiorari denied 1951, 341 U.S. 921, 71 S. Ct. 743, 95 L.Ed. 1355."

Notice that the first suit in *Norman Tobacco* was, as here, a contract action, and the second suit was, as here, an antitrust action. The decision in the case at bar is, therefore, in direct conflict with the decision of the Fifth Circuit in *Norman Tobacco*.

The decisions of the other Courts of Appeals which have dealt with this issue have also followed the principle that a litigant may not divide his grounds for recovery. See *Engelhardt* v. *Bell & Howell Co.*, 327 F.2d 30 (8th Cir. 1964); *Wolcott* v. *Hutchins*, 245 F. Supp. 578 (S.D.N.Y. 1965), *aff'd*, 365 F.2d 833 (2d Cir. 1966); *Samuel Blanken & Co.* v. *Goldblatt*, 371 F.2d 949 (D.C. Cir. 1966). See also *Baltimore S.S. Co.* v. *Phillips*, 274 U.S. 316 (1927). As a matter of fact the present decision of the Seventh Circuit not only cites no authority for its holding that there are two causes of action involved but also is in conflict with an earlier decision of its own circuit, namely, *F. L. Mendez & Co.* v. *General Motors Corp.*, 161 F.2d 695 (7th Cir. 1947). This conflict with other circuits and with the decision of its own circuit demonstrates the inherent confusion surrounding the present cause-of-action test for *res judicata*. It is also persuasive evidence that this Court should grant certiorari to review this test in light of modern developments in the Federal Rules and to consider substituting as the standard for *res judicata* the "common-nucleus-of-operative-facts" test for the outmoded cause-of-action test.

Although petitioner believes that the present law requires a reversal of the Seventh Circuit's decision because

both lawsuits in question arose out of the same transaction and operative facts, if the test were that of a common nucleus of operative facts, the same result would be achieved, and it would be an easier test to administer for the courts. This test also more clearly serves the underlying rationale for *res judicata*. The decisions after *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966), mentioned above, which have applied this test illustrate its ease of administration. See, *e.g.*, *United States ex rel. Mandel Bros. Contracting Corp.* v. *P. J. Carlin Constr. Co.*, 254 F.Supp. 637 (E.D.N.Y. 1966) and *American Foresight, Inc.* v. *Fine Arts Sterling Silver, Inc.*, 268 F.Supp. 656 (E.D. Pa. 1967).

The importance of review in this case is not lessened by the fact that when the trial judge in the second suit—the antitrust case—entered judgment, the judgment in the first suit had not yet been entered. The earlier case had been tried some six months earlier, briefs had been submitted, and there was nothing remaining except a decision. The judgment on the merits in the first suit was entered Monday, September 23, 1968, and the judgment holding the first suit to be *res judicata* was entered on Friday, September 20, 1968.

If there was a defect in timing of the judgment in the case at bar, this defect existed for only three days, and in any event, when this case reached the Seventh Circuit, the other case was consolidated with it and the Friday to Monday difference in dates of the judgments had become wholly immaterial. Moreover, there is authority for the proposition that a court may take judicial notice of a prior judgment so as to apply *res judicata* "to prevent additional repetitive litigation," *Holmes* v. *United States*, 231 F. Supp. 971, 972 (N.D. Ga. 1964), *aff'd per curiam*, 353 F.2d

785 (5th Cir. 1966). The Seventh Circuit should have followed *Holmes*. The *Holmes* decision is also in conflict with the decision of the Seventh Circuit.

If the reversal in the instant case by the Seventh Circuit on the ground that there was no final judgment is not reversed under the circumstances of the present case, it will surely weaken the doctrine of *res judicata*. The numerous public policy considerations in favor of finality of litigation are far too important to be ignored because the trial judge in the first suit filed did not enter judgment until three days after the trial judge decided the second case.

## CONCLUSION

In view of the important considerations which we have set forth above, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

Owen Rall
Peter M. Sfikas
135 South LaSalle Street
Chicago, Illinois 60603
ANdover 3-7300
*Counsel for Petitioner*

July 10, 1970

# APPENDIX

PREMIER ELECTRICAL CONSTRUCTION CO.

v.

MILLER-DAVIS CO., ET AL.

Decision of the United District Court for the Northern District of Illinois, Eastern Division

## MEMORANDUM OPINION

MAROVITZ, District Judge.

Motions of Defendants to Dismiss and for Judgment on the Pleadings

This is a civil antitrust action in which plaintiffs seek to recover treble damages for injuries resulting from an alleged violation of the Sherman Anti-Trust Act, 15 U.S.C. §§ 1-7, 15.

Plaintiff, Premier Electrical Construction Company and defendant St. Arnaud Electrical Company are direct corporate competitors engaged in the electrical construction business. Defendant Miller-Davis is in the general contracting business. On February 3, 1966, the Atomic Energy Commission sent invitations to various general contractors, including defendant Miller-Davis, to submit bids for an addition to the Argonne National Laboratory, Argonne, Illinois. The project was known as the Accelerator Improvement ZGS, FY-65 Meson Building Addition. In order to prepare their bids, the general contractors, including Miller-Davis, then sent invitations to various electrical sub-contractors, including Premier Electrical Construction Company, requesting bids on the electrical work to be performed on the Argonne project.

Plaintiff alleges that sometime between January 15, 1966, and March 3, 1966, a conspiracy arose between Miller-Davis and St. Arnaud such that Miller-Davis would induce St. Arnaud's competitors, including plaintiff, to submit inflated bids to the competitors of Miller-Davis, thereby insuring a successful bid by Miller-Davis and a sub-contract for St. Arnaud. Plaintiff claims that on March 3, 1966, it submitted its bid by telephone to Miller-Davis, was advised that it was the low bidder and, assuming that Miller-Davis was awarded the prime contract, that it, Premier, would be awarded the electrical sub-contract on the condition that it would "protect" Miller-Davis by submitting artificially inflated bids to other general contractors.

In its complaint (¶12), plaintiff acknowledges that it agreed to "protect" Miller-Davis if Miller-Davis would inform plaintiff of its receipt of a lower bid by a third party so that plaintiff could rebid to defendant's competitors. Miller-Davis did not advise plaintiff of any competitive bid on the electrical sub-contract. Plaintiff did submit high bids to general contractors other than Miller-Davis. The Atomic Energy Commission awarded the contract to Miller-Davis who then gave the sub-contract to defendant St. Arnaud.

On October 13, 1966, in another District Court for the Northern District of Illinois, Eastern Division, plaintiff filed a suit against Miller-Davis entitled Premier Electrical Construction Co. v. Miller-Davis Co.; Civil Action No. 66 C 1850. Plaintiff's amended complaint in that case set forth basically the same facts alleged in the present suit, save for the purported involvement of St. Arnaud. The language of the amended complaint in the first suit is virtually identical to that recited in the instant issue, especially in those paragraphs which relate to the agreement to "protect" Miller-Davis. The original action sought

$40,000 for breach of contract. Trial ended on March 27, 1968, and the case was taken under advisement. A decision is expected to be rendered shortly. In the present complaint, filed March 4, 1968, plaintiff claims deprivation of profits amounting to $65,000 as its damages and seeks an award of treble damages under 15 U.S.C. § 15.

Defendant Miller-Davis has moved to dismiss the present suit on the grounds of *res judicata* and *in pari delicto*. Defendant St. Arnaud seeks a judgment on the pleadings based on the doctrine of *in pari delicto*. Defendants admit plaintiff's factual allegations regarding the contract and sub-contract negotiations for the limited purpose of making their motions.

Because its first suit is based on contract while the present case stems from an alleged violation of the Sherman Act, plaintiff suggests that the respective causes of action are "totally separate and distinct in every respect." (Brief at 3). This argument is not well taken. It is the facts in each case, not the theories, which are crucial in determining the applicability of *res judicata*. Wolcott v. Hutchins, 245 F.Supp. 578 (S.D.N.Y. 1965), aff'd 365 F.2d 833 (2d Cir. 1966). Both of plaintiff's suits arise out of the same operative facts and disputed transactions the end result of which was the failure of plaintiff to secure the electrical sub-contract from Miller-Davis. The mere addition of a new, federal theory will not support new litigation.

The closest case in point to the one at bar is Norman Tobacco & Candy Co. v. Gillette Safety Razor Co., 295 F.2d 362 (5th Cir. 1961). In that case as here, plaintiff first filed a contract action and later sought relief in a

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* Premier Electrical Construction Company v. Miller-Davis Company, Sept. 23, 1968, 291 F. Supp. 295.

civil antitrust suit. Both cases were based on the same refusal of defendant to deal with the plaintiff. The Court of Appeals for the Fifth Circuit held the former case to be *res judicata* of the later one. The Court said at 363-364,

> "It is settled, contrary to appellant's contention, that a litigant may not split his claim and have two trials on the same alleged breach of duty. Basically, Norman claimed the same 'right' in both suits—the right to purchase Gillette products directly from Gillette. The only wrong charged against Gillette was its refusal to continue to deal with Norman. We held in the contract case that Norman had not shown that Gillette wrongfully refused to deal with it. There, appellant relied upon the breach of Gillette's supposed contractual relationship as the basis of its claim. Here, appellant relies upon the breach of the anti-trust laws as the basis for the alleged breach. But there was but one breach and one only and appellant has had its day in court and has lost. It cannot litigate this same breach again. (Citing cases)."

Plaintiff relies on Engelhardt v. Bell & Howell Co., 327 F.2d 30 (8th Cir. 1964) and Baltimore S. S. Co. v. Phillips, 274 U.S. 316, 47 S.Ct. 600, 71 L.Ed. 1069 (1927). In *Engelhardt*, however, a decision in an earlier suit under Missouri antitrust law was held to be *res judicata* in the later suit brought under federal antitrust statutes despite the incorporation of more specific allegations of interference in interstate commerce and a prayer for a different amount of damages. A plaintiff must plead his entire case on all theories at one time. Baltimore S. S. Co. v. Phillips, 274 U.S. 316, 320, 47 S.Ct. 600, 71 L.Ed. 1069 (1927); Engelhardt v. Bell & Howell Co., 327 F.2d 30, 33 (8th Cir. 1964). This plaintiff has not done. In fact, Premier filed the present suit within a few weeks prior to the trial of its original suit against Miller-Davi

Nor will a change in parties necessarily affect the applicability of *res judicata*. See, e. g., Baltimore S. S. Co. v. Phillips, 274 U.S. 316, 47 S.Ct. 600, 71 L.Ed. 1069 (1927) In Koblitz v. Baltimore and Ohio Railroad Co., 164 F.Supp. 367 (S.D.N.Y.1958), the Court held that a new charge of conspiracy in a second suit brought by plaintiff against defendant was not sufficient to preclude the application of *res judicata* in the second case. The Court said, at 372,

> "Here the wrongs complained of, the harm to the plaintiff and the recovery sought are substantially identical. The same witnesses and the proof of the same facts would be necessary to establish the allegations of the prior complaint and would support both actions. * * *
>
> "To the extent, if at all, that the allegations of the present complaint are dissimilar to those in the prior action, all the facts now pleaded were known to the plaintiff and could have been presented in the first action."

As to defendant Miller-Davis, *res judicata* would be a good defense if there were a final judgment in the first suit. While a decision is expected in a few days, such a final judgment has not yet been handed down. However, concurrent duplicate litigation is no less undesirable than successive duplicate litigation. In either situation, a second suit violates principles of comity between judges, creates administrative inefficiencies in the federal courts, and imposes an unfair burden on the defendant. Eastern States Petroleum & Chemical Corp. v. Walker, 177 F. Supp. 328, 333 (S.D.Tex.1959); Emerson Electric Manufacturing Co. v. Emerson Radio and Phonograph Co., 140 F.Supp. 588, 589 (D.N.J.1956). Thus, the public policies in favor of a single suit in a single controversy and against contentious litigation remain viable. Asbury v. Chesapeake & Ohio Railway Co., 264 F.Supp. 437, 438 (D.Col.1967); Paluchowska v. United States Lines Co., 93 F.Supp. 751,

752 (S.D.N.Y.1950). The pendency of a prior action in the same jurisdiction, between the same parties, and arising out of the same transaction constitutes good grounds for abating the subsequent suit. Commerce Oil Refining Corp. v. Miner, 303 F.2d 125 (1st Cir. 1962). Consequently, the motion to dismiss of defendant Miller-Davis is granted.

Defendant St. Arnaud was not a party in the original action brought by Premier and may not now plead *res judicata* or take advantage of abatement. St. Arnaud's motion for judgment on the pleadings is based on the defense of illegality. Miller-Davis has adopted the arguments of St. Arnaud as additional support for its motion to dismiss. The Court is faced with two questions: whether plaintiff's agreement with Miller-Davis is illegal and, if illegal, whether plaintiff is barred from recovery of treble damages in a civil antitrust suit.

Defendants claim that Premier is seeking to collect on an illegal bid-rigging agreement. Plaintiff, in his complaint, affirmatively pleaded that, as consideration for a promise of business, it agreed to "protect" Miller-Davis by submitting higher bids to other general contractors, but now suggests that such conduct is not illegal because the agreement was not between direct competitors. Premier even asserts that its agreement "could only promote competition between the various contractors [because plaintiff] removed itself from competition." (Brief at 9).

That Premier's conduct is illegal is clear. In accord with a secret agreement with one of the defendants, plaintiff presented artificially inflated bids to all general contractors who were competitors of Miller-Davis. By failing to submit the same low bid on the subcontract to all general contractors, plaintiff intended to insure the success of one favored party. "A bargain not to bid at * * * any public competition for a * * * contract, having as its pri-

mary object to stifle competition, is illegal." Restatement, Contracts § 517 (1932). The falsification of a bid, in itself and by effectively excluding others from competition, stifled the unfettered operation of the market place. A restraint on price competition and on meaningful access to the market is illegal *per se*. United States v. General Motors Corp., 384 U.S. 127, 145-147, 86 S.Ct. 1321, 16 L.Ed.2d 415 (1966); Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940). Rigging competition on a public contract whether done directly or indirectly, is simply a restraint of trade in violation of public policy and void. See generally, Corbin, Contracts § 1468 (1962).

Plaintiff attempts to avoid the impact of these clear rules, claiming that it was not a direct competitor with the other party to the protection agreement. However, the particular form taken by the agreement, whether price fixing or profit sharing, horizontal or vertical, is really immaterial. Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959). Thus, in Mechanical Contractors Bid Depository v. Christiansen, 352 F.2d 817 (10th Cir. 1965), cert. denied, 384 U.S. 918, 86 S.Ct. 1365, 16 L.Ed.2d 439 (1966), it was held that foreclosure of a subcontractor's competitive bid to general contractor by repressive rules of a bid depository association was illegal.

Given, then, that plaintiff's conduct is illegal, may he nevertheless recover treble damages in a civil antitrust suit? Plaintiff submits that the recent Supreme Court decision in Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 88 S.Ct. 1981, 20 L.Ed.2d (1968), precludes defendants' use of the doctrine of *in pari delicto*, under which a court will not entertain a suit brought by a party in equal fault with the defendant(s). At first blush, plaintiff seems correct for Mr. Justice Black, in an-

nouncing the Court's decision, held "that the doctrine of *in pari delicto*, with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action." 392 U.S. at 140, 88 S.Ct. at 1985.

A closer look at the opinion, however, suggests that the quoted statement neither deserves nor was intended to have universal application. The Court's opinion rests on two pillars: one, mere participation in an illegal scheme is not a sufficiently serious wrong to warrant denial to plaintiff of his chance in court and, two, the public policy in favor of competition is furthered by allowing private suits for treble damages. The opinion stresses and must be read in light of, the facts. In the Court's view, plaintiff's lack of initiative and commitment to the illegal scheme was crucial. Thus, "their [petitioner's] participation was not voluntary in any meaningful sense," "many of the clauses [in the franchise agreement] were quite clearly detrimental," "acquiescence was necessary," and "plaintiff did not aggressively support * * * the * * * scheme." Rather, the arrangement was "formulated and carried out by others" and "thrust upon them" by defendants. 392 U.S. at 139-141, 88 S.Ct. at 1985, 1986. On these facts, Mr. Justice Black held that plaintiffs could maintain their action.

However, the Court refused to go farther, to extend its decision to cover cases involving a more tainted petitioner. Mr. Justice Black, at 140, 88 S.Ct. at 1985, said:

> "We need not decide, however, whether such truly complete involvement and participation in a[n] [illegal] scheme could ever be a basis, wholly apart from the idea of *pari delicto*, for barring a plaintiff's cause of action * * *."

That the defense of illegality is still viable in civil antitrust actions is further supported by the other four opinions in the case. Mr. Justice White, in his concurring opinion, stated that a condition precedent to allowing a tainted

plaintiff to proceed with a treble damages suit was that plaintiff's participation was coerced or thrust upon him. He cautioned, however, that a moving force "should not be rewarded for his efforts to further an unlawful price arrangement" and take from defendant treble damages. 392 U.S. at 145, 88 S.Ct. at 1988. The approach of Mr. Justice Fortas was similar for he said that a co-adventurer, one who "originated and insisted" upon the illegal scheme could not recover damages. 392 U.S. at 147-148, 88 S.Ct. 1981, 1989. Mr. Justice Marshall would allow the defense of illegality against a plaintiff who "actively participated in the formulation and implementation" of the illegal scheme. 392 U.S. at 149, 88 S.Ct. at 1989. Justices Harlan and Stewart agree that *in pari delicto* has its place in anti-trust cases. 392 U.S. at 153, 88 S.Ct. 1981.

Thus, in each of the five opinions in the case, the door was left open for a limited application of a defense of illegality in civil antitrust actions. The distinctions drawn throughout the various opinions are particularly relevant here. Premier is not a mere participant or unwilling victim of the transaction out of which this case arose. Rather, Premier was an originating, moving, active and aggressive party to the illegal bid-rigging scheme. There is no indication that the Supreme Court sought to protect a plaintiff so intensely involved in an illegal restraint on trade.

Moreover, it is difficult to see how allowing a suit for treble damages, under the facts in this case, would be consistent with the purposes of the antitrust laws, the second main rationale advanced by Mr. Justice Black for his decision in *Perma Life*. Discussing an example similar to the present case, Mr. Justice White noted, at 146, 88 S.Ct. at 1988:

> "To permit [plaintiff] a recovery may be a counter-deterrent. By assuring him illegal profits if the agree-

> ment in restraint of trade succeeds, and treble damages if it fails, it may encourage what the Act was designed to prevent."

Conversely, if allowing relief would be counterproductive, and possibly add an undesirable incentive to violate the law, denial of relief to plaintiff, as the Supreme Court has recognized for many years will, more probably, discourage involvement in illegal schemes.

> "The more plainly parties understand that when they enter into contracts of this nature they place themselves outside the protection of the law * * * the less inclined will they be to enter into them. In that way the public secures the benefit of rigid adherence to the law." McMullen v. Hoffman, 174 U.S. 639, 670, 19 S.Ct. 839, 851, 43 L.Ed. 1117 (1899).

Plaintiff in this case initially violated the law in an attempt to secure a public contract. Having failed, it now seeks not just refuge, but reward in this court. We find no sanctuary in the *Perma Life* decision for a plaintiff like this. If ever a party was to be barred from recovering treble damages, it is Premier. While we sanction the defense of illegality, call it *in pari delicto* if you will, in these circumstances, it is not, of course, because of our approval of defendants' actions, but because the law will not enforce what is forbidden, and "will leave the parties as it finds them." McMullen v. Hoffman, 174 U.S. 639, 670, 19 S.Ct. 839, 851, 43 L.Ed. 1117 (1899). Consequently, plaintiff will not be permitted, having attempted to avoid the burdens, now to reap the benefits of the law.* The respective motions of Miller-Davis and St. Arnaud to dismiss and for judgment on the pleadings are granted.

In the

# United States Court of Appeals

## For the Seventh Circuit

SEPTEMBER TERM, 1968 — APRIL SESSION, 1969

Nos. 17290, 17312

PREMIER ELECTRICAL CONSTRUCTION COMPANY,

*Plaintiff-Appellant,*

v.

MILLER-DAVIS COMPANY and ST. ARNAUD ELECTRIC COMPANY,

*Defendants-Appellees.*

PREMIER ELECTRICAL CONSTRUCTION COMPANY,

*Plaintiff-Appellant,*

v.

MILLER-DAVIS COMPANY,

*Defendant-Appellee.*

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

March 6, 1970

Before SWYGERT, *Chief Judge*, KERNER, *Circuit Judge*, and WISE, *District Judge*.[1]

SWYGERT, *Circuit Judge*. These are consolidated appeals in companion cases. No. 17312 is an appeal from

[1] Judge Henry S. Wise is sitting by designation from the United States District Court for the Eastern District of Illinois.

judgment in favor of Miller-Davis Company after a bench trial on the merits in a breach of contract action instituted by Premier Electrical Construction Company against Miller-Davis. No. 17290 is an appeal from the dismissal on the pleadings of a treble damage antitrust action instituted by Premier against Miller-Davis and St. Arnaud Electric Company. We affirm the judgment in favor of Miller-Davis on the contract action. We reverse the judgment dismissing Premier's antitrust complaint and remand for trial.

*The Contract Action*

The facts relating to the contract action are substantially as follows: In February 1966, the Atomic Energy Commission invited several general contractors, including Miller-Davis, to bid on a project at the Argonne National Laboratories, Argonne, Illinois. The Commission requested a base bid and a bid for nine alternates. The bids were to be opened at 2 p.m., March 3, 1966. The electrical portion of the contract comprised approximately one-third of the total work. Miller-Davis invited bids from several electrical subcontractors, including Premier.

On March 2, 1966, the day before the bids were to be submitted, Stanley Wielgos, Premier's vice-president, telephoned Paul Hunsberger, assistant division manager of Miller-Davis. Wielgos stated that Premier wanted to work with Miller-Davis and requested some assurance that Miller-Davis would work with Premier if Premier was the lowest bidder on the electrical subcontract work. Hunsberger gave no assurance but asked Wielgos to call back at 12:30 on March 3. Wielgos mentioned a base bid of $450,000 to $500,000 during the March 2 conversation.

At 12:30 p.m. on March 3, Wielgos called Hunsberger. Wielgos gave Hunsberger a base bid of $274,100 and an overall bid—the base bid plus the nine alternate bids—of

$494,800. Hunsberger said the bid was "very interesting." Wielgos asked, "Do we have a job if you have one?" Hunsberger replied, "If it goes in now, you have a job." Hunsberger then intimated that he would like "sizeable protection" on Premier's price. Both Wielgos and Hunsberger understood that "protection" meant that Premier would submit higher bids to Miller-Davis' competitors so that the latter would have the lowest electrical costs. The submission of inflated bids would nearly insure that Miller-Davis would be the lowest bidder on the prime contract since there was a substantial difference (about $200,000) between Premier's and the other subcontractors' bids for the electrical work. Wielgos accepted this arrangement saying, "[W]e are banking on you getting the job and we are willing to gamble on you and you only."

At Hunsberger's suggestion Wielgos called back around 1 p.m. on March 3 to see if Premier's bid was still the lowest. Hunsberger said that it was and told Wielgos "as it stands now, you [have the job]." Wielgos called again at 1:30 p.m. and was told that his was still the lowest bid. Wielgos told Hunsberger that if Premier's bid was not the lowest, he wanted to submit Premier's Miller-Davis' bid to the other general contractors.

During the morning and early afternoon of March 3 Hunsberger received bids from other electrical subcontractors. Around 1:40 p.m. Hunsberger told William Sinclair, vice-president and Chicago division manager of Miller-Davis, that another electrical subcontractor, St. Arnaud Electrical Company, had submitted cost figures of $225,000 on the base bid. Sinclair called Joe Abrams, electrical engineer for St. Arnaud, and asked if St. Arnaud would take the job for a base bid of $255,000. Abrams accepted this suggestion five minutes later. Sinclair incorporated St. Arnaud's electrical base bid in

Miller-Davis' overall bid estimate and contacted Richard Larson, a Miller-Davis employee, who actually submitted the bid at the Argonne facilities. Miller-Davis subsequently was awarded the contract with the Atomic Energy Commission and a written contract was executed. Miller-Davis, in turn, awarded the electrical subcontract to St. Arnaud.

On March 3 and 4 Wielgos called Hunsberger several times and asked if Premier's figures had been used in the Miller-Davis' bid. Hunsberger refused to answer this inquiry. In a conversation on March 4 Wielgos angrily asked Hunsberger whether or not there had been an "agreement" between Premier and Miller-Davis. Hunsberger admitted that there had been.

On these facts the district court held that no contract was formed since the dealings between the parties did not possess the requisites of a formal contract.[2] The court further held that even if a contract was formed, it, nevertheless, would be unenforceable because of the illegality of its terms. Since we affirm the district court's holding that no contract was formed, we need not consider the alternate holding that the contract was illegal.

If the rules ordinarily applicable to the formation of subcontracts are applied in this case, the communications between Premier and Miller-Davis constitute, at best, negotiations preliminary to the formation of a contract. The submission of a bid for a subcontract is an offer. 1 CORBIN, CONTRACTS § 24 (1950). Acceptance of a subcontractor's bid generally occurs only when a written contract specifically setting out the terms of the agreement is entered into by the general contractor and the

[2] The district court's opinion is reported at 291 F.Supp. 295 (N.D.Ill. 1968).

subcontractor. *Plumbing Shop, Inc.* v. *Pitts*, 67 Wash.2d 514, 408 P.2d 382 (1965). The use of a subcontractor's bid by a general contractor in preparing his bid on the prime contract does not constitute acceptance of the offer, *Merritt-Chapman & Scott Corp.* v. *Gunderson Bros. Engineering Corp.*, 305 F.2d 659 (9th Cir. 1962). *Williams* v. *Facret*, 161 F.2d 822 (5th Cir. 1947). Many courts have held that the same rule applies even if the general contractor is awarded the prime contract. *Baird Co.* v. *Gimbel Bros.*, 64 F.2d 344 (2d Cir. 1933); *but cf. Drennen* v. *Star Paving*, 51 Cal.2d 409, 333 P.2d 757 (1958). Since Premier's bid was not used in Miller-Davis' final bid, and was not accepted through the formation of a written contract, no contract was formed.

Premier argues, however, that the ordinary rules do not apply in this case. We agree that proof of business custom or evidence of express intent to the contrary can modify the general rules set out above and demonstrate that the parties intended that a contract be formed prior to the signing of a written agreement. *Industrial Electric Seattle, Inc.* v. *Bosko*, 67 Wash.2d 783, 410 P.2d 10 (1966), *cf. Traff* v. *Farbo*, 337 Ill.App. 83, 84 N.E.2d 874 (1949). Premier has offered no evidence of business custom contrary to these rules and instead relies only upon the conversations between Wielgos and Hunsberger to demonstrate that Miller-Davis accepted Premier's bid.

Premier makes two arguments. Premier first contends that during the telephone conversations on March 3 Miller-Davis accepted Premier's bid in return for "protection" provided by Premier subject to the condition that the general contract was ultimately awarded to Miller-Davis. The district court found, and we agree, that the evidence fails to support this contention. On the contrary, those conversations indicate that both parties re-

tained their freedom to withdraw at any time. Thus, Hunsberger repeatedly emphasized to Wielgos that Premier was entitled to nothing if a lower bid was made by another subcontractor. Wielgos understood this to be the case as evidenced by his repeated questioning of Hunsberger concerning how his bid was "holding up" and by his assertion in the 1:30 p.m. conversation on March 3 that he wished to publish his Miller-Davis' bid to other general contractors in the event that his bid was not the lowest.

Premier's second argument asserts that Premier and Miller-Davis entered into a much more complicated arrangement. In return for "protection" it is alleged that Miller-Davis orally accepted Premier's bid subject to the following conditions: that Premier was the lowest bidder; that Miller-Davis used Premier's bid in preparing its prime bid; and that Miller-Davis was awarded the prime contract. The district court found that such an agreement had been formed, relying primarily on a vague admission by Hunsberger in the telephone conversation with Wielgos on March 4. Nevertheless, this agreement standing alone would be insufficient to give Premier a cause of action since St. Arnaud's bid was lower than Premier's and was used in calculating Miller-Davis' bid on the general contract. The district court found, however, that a collateral promise existed whereby Miller-Davis agreed not to inform anyone of the exact amount of Premier's bid. The court further found that this collateral promise was breached and that Miller-Davis was estopped from denying that Premier's bid was lowest. We disagree. The record contains little evidence that such a promise was made and no evidence that Miller-Davis informed St. Arnaud or anyone else of the exact amount of Premier's subcontract bid to Miller-Davis. Therefore,

even if we were to agree that the complicated arrangement set out above actually existed, there is no evidence that its conditions were breached. Thus we hold that no contract was formed. Miller-Davis advances several additional defenses to Premier's claim that an enforceable contract was formed between Miller-Davis and Premier.[3] In light of our holding these additional arguments need not be considered.[4]

*The Antitrust Action*

The antitrust action instituted by Premier was filed subsequent to its action based on contract and was heard by a different district judge. On September 16, 1968, seven days prior to the decision on the merits in the contract action, Premier's antitrust action was dismissed following a motion for judgment on the pleadings.[5] The district court held that Premier was barred from maintaining its action against Miller-Davis and St. Arnaud under the doctrine of *in pari delicto*. The court further

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[3] Miller-Davis argues that the contract contemplated by the parties involved complicated and detailed provisions not discussed by Hunsberger and Wielgos. Therefore, since the alleged oral contract involved only the price of the subcontract work it lacked sufficiently definite terms to create a contract between Miller-Davis and Premier. Miller-Davis further argues that any contract so formed would be invalid under the statute of frauds. Finally, Miller-Davis argues that Premier suffered no damages since St. Arnaud lost money in the performance of the sub-contract work.

[4] The district court accepted Miller-Davis' first argument, holding that the alleged oral agreement was indefinite and unenforceable. *Plumbing Shop, Inc.* v. *Pitts*, 67 Wash.2d 514, 408 P.2d 382 (1965). The district court did not reach Miller-Davis' statute of frauds and the damages defenses.

[5] The district court's opinion is reported at 292 F.Supp. 213 (N.D.Ill. 1968).

held that the doctrine of res judicata prevented Premier from asserting its antitrust claim against Miller-Davis. In those rulings the district court erred.

In considering Premier's appeal from the dismissal of its antitrust claim we are limited to the pleadings which were before the district court. The essential allegations of Premier's complaint are contained in paragraphs 9 and 11.[6] In paragraph 9 Premier alleged that Miller-Davis and St. Arnaud entered into a conspiracy to induce St. Arnaud's competitors to submit inflated electrical subcontract bids to Miller-Davis' competitors. Miller-Davis would obtain the general contract as a result and there-

[6] Paragraph 9 of the complaint reads:

> 9. That sometime between January 15, 1966, and March 3, 1966, the defendants by and between themselves conspired to restrict the competition of the defendant, Miller-Davis Company, for the said A.E.C. contract in that the defendants entered into a secret agreement wherein the defendant, Miller-Davis Company, would induce the defendant, St. Arnaud Electric Company's competitors, including the plaintiff as hereinafter set forth, to submit substantially higher bids to defendant, Miller-Davis Company's competitors thereby insuring that the defendant, Miller-Davis Company, would be the successful bidder, who in turn would then award the electrical subcontract to the defendant, St. Arnaud Electric Company, on a noncompetitive basis.

Paragraph 11 of the complaint reads:

> 11. That on March 3, 1966, plaintiff submitted by telephone its oral bid to the defendant, Miller-Davis Company; that at the time that plaintiff submitted its bid to the said defendant, the said defendant in furtherance of the said secret agreement between the defendants, advised plaintiff that it was the low bidder as of the time and date the bid was received, and further advised plaintiff that if plaintiff would "protect" the defendant, Miller-Davis Company, by submitting higher electrical bids to said defendant's competitors, it would award plaintiff the electrical subcontract providing that the defendant, Miller-Davis Company, was the successful bidder with the A.E.C.

after would award the electrical subcontract to St. Arnaud on a noncompetitive basis. Paragraph 11 alleges that Miller-Davis induced Premier to submit higher electrical subcontract bids to Miller-Davis' competitors and assured Premier that it would in return receive the electrical subcontract.

On the basis of these pleadings the agreement between Miller-Davis and Premier constitutes a per se violation of the Sherman Act. By preventing Premier from submitting bids to other general contractors at the same prices made available to Miller-Davis, the agreement constitutes a concerted refusal to deal. *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 (1959). The general contractors were thereby denied meaningful access to the market for the Argonne project contract. *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966). Thus, on similar facts the court in *Mechanical Contractors Bid Depository* v. *Christiansen*, 352 F.2d 817 (10th Cir. 1965), *cert. denied*, 384 U.S. 918 (1966), held that a bid depository agreement which prevented the plaintiff-subcontractor from submitting competitive bids to general contractors was illegal under the antitrust laws. We also believe the agreement violates the prohibition against price restraints. As the Supreme Court said in *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940): "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price . . . is illegal." The intended effect and probable result of the agreement here was to cause a higher overall price on the Argonne project contract than would otherwise have prevailed.

The defendants rely upon *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968), to establish their contention that the illegality of Premier's con-

duct forecloses its right to maintain this suit. In *Perma Life*, Mr. Justice Black writing for five members of the Court said, ". . . the doctrine of *in pari delicto*, with all its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action. . . ." *Perma Life Mufflers* v. *International Parts Corp.*, *supra* at 140. We believe that *Perma Life* stands for a more limited rule, however, since Mr. Justice Black expressly reserved the question ". . . whether such truly complete involvement and participation in a monopolistic scheme could ever be a basis, wholly apart from the idea of *in pari delicto*, for barring the plaintiff's cause of action . . ." *Perma Life Mufflers* v. *International Parts Corp.*, *supra* at 140. On the basis of the pleadings before him, Mr. Justice Black found that plaintiffs' participation in the illegal agreement with Midas was "not voluntary in any meaningful sense" and that they "accepted many of these restraints solely because their acquiescence was necessary to obtain an otherwise attractive business opportunity." *Perma Life Mufflers* v. *International Parts Corp.*, *supra* at 139. Thus we believe that *Perma Life* holds only that plaintiffs who do not bear equal responsibility for creating and establishing an illegal scheme, or who are required by economic pressures to accept such an agreement, should not be barred from recovery simply because they are participants.

Many factors are, therefore, relevant in determining whether participation by the plaintiff in an illegal agreement constitutes a defense to his treble damage action. Difficult factual questions are involved in making such a determination. This is especially true where, as here, the plaintiff and defendant are not competitors but instead are dealing at arm's length in a vertical relationship in the purchase and sale of goods and services. In such

cases the relative bargaining power of each party to the agreement is relevant in ascertaining whether the plaintiff was forced by economic pressures to enter into the agreement. Similarly, evidence concerning the formation of the agreement including facts pertaining to which party initiated each of its provisions may control the availability of the defense in particular situations.

The district court erred in holding that these factual questions were sufficiently resolved by the allegations of the pleadings. In antitrust cases where factual questions play important roles, summary procedures should be avoided. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962). On the basis of the pleadings before us we cannot say that Miller-Davis did not possess sufficient bargaining power in its dealings with Premier to force Premier to offer protection to Miller-Davis. Furthermore, the factual question of who actually initiated the protection scheme is completely unresolved by the pleadings. Remand of this case will allow these and other questions to be more fully considered.

The district court, in an alternate holding, determined that Premier's action against Miller-Davis was barred by the doctrine of res judicata. We disagree. Before a prior action can be res judicata, a final judgment in that action must be rendered. *Sypert* v. *Miner*, 266 F.2d 196 (7th Cir. 1959); *Muchard* v. *Berenson*, 307 F.2d 368 (9th Cir. 1962). Therefore, since final judgment had not been rendered in the contract action when the decision was announced in the antitrust action, res judicata was inappropriate.

Miller-Davis, without citing authority, maintains that this defect is now cured since final judgment has been entered in the contract action and that we should therefore affirm the district court's alternate holding. Assum-

ing without deciding that we could affirm the district court on this basis, we, nevertheless, think that res judicata would be inapplicable to bar Premier's antitrust claim.[7] The cases cited by Miller-Davis including *Engelhardt v. Bell & Howell Co.*, 327 F.2d 30 (8th Cir. 1964), and *Norman Tobacco & Candy Co. v. Gillette Safety Razor Co.*, 295 F.2d 362 (5th Cir. 1961), are distinguishable. The allegations of the contract and antitrust complaints here allege essentially different causes of action growing out of different operative facts.[8] The antitrust claim rests primarily upon a conspiracy between Miller-Davis and St. Arnaud to deceive Premier occurring prior to any dealings between Premier and Miller-Davis. Although the difficulty of proving such a conspiracy may be great, we believe the complaint alleges injury to Premier wholly apart from breach of contract.

For these reasons the judgment in appeal 17312 is affirmed and the judgment in appeal 17290 is reversed and remanded for trial.

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[7] Miller-Davis does not argue and we do not decide whether the doctrine of collateral estoppel is applicable to facts proved in the contract action in determining the availability of the defense of *in pari delicto* in this case.

[8] The district court apparently recognized the res judicata was inappropriate and based his dismissal of Premier's action against Miller-Davis in part on the ground of comity. In light of our holding that the antitrust and contract actions constitute separate causes of actions, we believe that comity would, at most, have justified a stay of the antitrust action pending the outcome of the contract action.

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
AUG 6 1970
E. ROBERT SEAVER, CLERK

No. 374

# In the Supreme Court of the United States

OCTOBER TERM, 1970

MILLER-DAVIS COMPANY, a Corporation,

*Petitioner,*

vs.

PREMIER ELECTRICAL CONSTRUCTION COMPANY, a Corporation,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TOM L. YATES
One First National Plaza
Chicago, Illinois 60670

A. DENISON WEAVER
33 North Dearborn Street
Chicago, Illinois 60602

*Counsel for Respondent*

McCORMICK & HENDERSON, CHICAGO

# In the Supreme Court of the United States

OCTOBER TERM, 1970

## No. 374

**MILLER-DAVIS COMPANY**, a Corporation,

*Petitioner*,

vs.

**PREMIER ELECTRICAL CONSTRUCTION COMPANY**, a Corporation,

*Respondent*.

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Premier Electrical Construction Company, a corporation, respectfully prays that petitioner, Miller-Davis Company's Petition for a Writ of Certiorari to review the judgment and Opinion of the United States Court of Appeals for the Seventh Circuit entered on March 6, 1970, be denied.

## Opinion Below

The Opinion of the Court of Appeals for the 7th Circuit is reported in 422 F.2d 1132.

## Question Presented

The respondent disagrees with the question as presented by the petitioner in that the Court of Appeals expressly found as a matter of law that "the allegations of the contract and antitrust complaints here allege essentially different causes of action growing out of different operative facts." (App. 22). Therefore, even if the judgment in the contract action had been entered prior to the judgment in the antitrust case, the latter would not be barred under the doctrine of *res judicata*.

## Statement of the Case

Respondent disagrees with petitioner's statement of the case in that it is based on an erroneous conclusion. On page 3 of its brief petitioner concludes that "The allegations in these three complaints, except as to the theory of recovery, are virtually identical."

As the Court of Appeals pointed out, the essential allegations in the instant case are found in paragraphs 9 and 11 of respondent's complaint wherein a conspiracy is alleged between the defendants, Miller-Davis Company and St. Arnaud Electric Co. for the purpose of limiting competition for the subject construction contract. (App. 18).

The original contract action did not allege a conspiracy but was strictly limited to an alleged violation of a contract between the parties to that suit. St. Arnaud was not a party to the contract action.

On page 6 of its brief petitioner purports to quote from the Opinion of the Court of Appeals, however, it has omitted the following sentence:

> The allegations of the contract and antitrust complaints here allege essentially different causes of action growing out of different operative facts.

and attempted to bridge this gap in its quotation by inserting the phrase "for the reason that".

It is respectfully submitted that inasmuch as the court found as a matter of law that the two causes of action grew out of different operative facts there is no basis for the application of the doctrine of *res judicata*.

## Argument

The Petition for Writ of Certiorari should be denied as the Court of Appeals found that each case arose out of "different operative facts" which precludes the application of the doctrine of *res judicata*.

Petitioner's application for Writ of Certiorari is predicated on the erroneous assumption that the instant antitrust action and the prior contract action had a "common nucleus of operative facts". The Court of Appeals expressly found to the contrary, for it stated:

> The allegations of the contract and antitrust complaints here allege essentially different causes of action growing out of different operative facts. (App. 22).

The authorities relied on by petitioner are distinguishable from the instant case in that the doctrine of *res judicata* was found to be applicable only after the court found that both cases arose out of the same operative facts.

As the Court of Appeals stated, the substance of this action is a conspiracy between the defendants which arose prior to the time that petitioner and respondent had any dealings between themselves. (App. 22)

In *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 99 L.Ed. 1122, 77 S.Ct. 865, the plaintiff sought recovery for an alleged violation of the Federal Antitrust Laws arising out of the leasing of motion picture advertising posters. There had been a prior action between the plaintiff and some of the defendants which also involved an alleged violation of the Federal Antitrust Laws which had been settled between the parties and dismissed with prejudice.

The defendants pleaded the prior dismissal with prejudice as *res judicata* in the instant action. The District Court allowed and the Court of Appeals affirmed defendant's motion on the ground that both suits involved "essentially the same course of wrongful conduct". The Supreme Court in reversing the Court of Appeals and remanding the cause to the District Court for further proceedings pointed out:

> That both suits involved 'essentially the same course of wrongful conduct' is not decisive. Such a course of conduct . . . may frequently give rise to more than a single cause of action. And so it is here. The conduct presently complained of was all subsequent to the 1943 judgment. 349 U.S. 322, 327-328.

As has been pointed out the instant case involves a conspiracy between the defendants taking place prior to any dealings between the petitioner and respondent which was the subject matter of the original contract action.

The fact that this case involves an alleged violation of the Federal Antitrust Laws is still another ground for denying the application of the doctrine of *res judicata*. For as the court pointed out in *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 99 L.Ed. 1122, 77 S.Ct. 865:

> And, as already noted, a prior judgment is res judicata only as to suits involving the same cause of action. There is no merit, therefore, in the respondents' contention that petitioners are precluded by their failure in the 1942 suit to press their demand for injunctive relief. Particularly is this so in view of the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action. Acceptance of the respondents' novel contention would in effect confer on them a partial immunity from civil liability for future violations.
>
> Such a result is consistent with neither the antitrust laws nor the doctrine of res judicata.

In the instant case if petitioner's contention is accepted it would also in effect confer on them immunity from any civil liability arising under the Federal Antitrust Laws.

## Conclusion

It is respectfully submitted that the Court of Appeals properly applied the doctrine of *res judicata* as it applied to the facts in the instant action and the petition for Writ of Certiorari should be denied.

Respectfully submitted,

Tom L. Yates
A. Denison Weaver
*Counsel for Respondent*

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No. 374

# In the Supreme Court of the United States

OCTOBER TERM, 1970

**MILLER-DAVIS COMPANY**, a Corporation,

*Petitioner,*

vs.

**PREMIER ELECTRICAL CONSTRUCTION COMPANY**, a Corporation,

*Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

## PETITIONER'S REPLY BRIEF

OWEN RALL
PETER M. SFIKAS
135 S. LaSalle Street
Chicago, Illinois 60603
*Counsel for Petitioner*

SORG/CHICAGO U.S.A.

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## PETITIONER'S REPLY BRIEF

The respondent, in its brief opposing certiorari, suggests a novel theory upon which to sustain the judgment of the Seventh Circuit Court of Appeals. Respondent argues that because its alleged theory of recovery in the instant case is based upon the antitrust laws this fact alone should preclude the application of the doctrine of *res judicata*. In support of this argument respondent cites *Lawlor v. Na-*

*tional Screen Service Corp.*, 349 U.S. 322 (1955). Respondent also relies upon the *Lawlor* decision for the proposition that the doctrine of *res judicata* is inapplicable even though both suits involve "essentially the same course of wrongful conduct". Clearly, the *Lawlor* decision is not authority for either of these propositions. In *Lawlor* the conduct complained of in the second lawsuit was *all subsequent to the judgment entered in the earlier lawsuit.* Thus, this Court at p. 328 succinctly stated the essence of its decision:

> "While the 1943 judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case."

In addition, the interpretation given to the *Lawlor* decision by the respondent is completely answered by the Eighth Circuit Court of Appeals in *Engelhardt* v. *Bell & Howell Co.*, 327 F.2d 30, 36 (8th Cir. 1964).

The importance and substantiality of the questions presented by us are not denied by respondent. The respondent takes the position that the Court of Appeals was correct but does not deny that recent decisions of other Courts of Appeal referred to on pages 12 through 14 of our Petition are in conflict with this decision of the Seventh Circuit.

Respondent has shown no reason why this Court should not grant certiorari to review and bring down to date the scope of *res judicata* in light of the relatively recent liberal pleading provisions of the Federal Rules of Civil Procedure. Moreover, this Court should reverse the Seventh

Circuit's highly restrictive application of the identity-of-causes-of-action test which itself is outmoded and inconsistent with the liberal rules of pleading in the Federal Courts.

Respectfully submitted,

OWEN RALL
PETER M. SFIKAS
135 South LaSalle Street
Chicago, Illinois 60603
ANdover 3-7300
*Counsel for Petitioner*

September 23, 1970